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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057072
Party	Plaintiff World Health Products f/k/a German American Technologies, LLC
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Attachments	Petitioner's Opposition to Registrant's Motion to Set Aside Default Jgmt.pdf(165478 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board

In the matter of U.S. Registration 4,284,010
For the mark LIQUID RELAXATION,
Registered on the Principal Register on January 29, 2013.

World Health Products f/k/a German American Technologies,	:	
	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92057072
	:	
DLR Associates, Inc.,	:	
	:	
Registrant.	:	

**PETITIONER’S OPPOSITION TO REGISTRANT’S MOTION TO SET ASIDE
DEFAULT JUDGMENT AND REINSTATE THE CANCELLATION PROCEEDING**

COMES NOW the Petitioner, World Health Products f/k/a German American Technologies (hereinafter “Petitioner”), by counsel, and responds to the Registrant, DLR Associates, Inc., (hereinafter “Registrant”) instant Motion to Set Aside Default Judgment and Reinstate the Cancellation Proceeding. For the reasons and on the grounds more fully set forth below, Petitioner respectfully requests that the Board deny the instant motion and relief requested by Registrant.

STATEMENT OF THE CASE

1. On or about April 11, 2013 Petitioner filed a Petition to Cancel Registrant’s Federal Trademark Registration No. 4,284,010 for the mark LIQUID RELAXATION (hereinafter “Registrant’s Mark”) on the grounds of priority of use and likelihood of confusion with Petitioner’s Claimed Mark LIQUID RELAX (hereinafter “Petitioner’s Mark”).

2. On or about May 21, 2013 Registrant’s former counsel filed a Notice of Appearance as Counsel for Registrant and Answer to Petitioner’s Petition to Cancel.

3. On or about June 17, 2013 counsel for both parties attended the Discovery Conference in this matter.

4. On or about December 2, 2013 former Counsel for Registrant filed a Motion to Withdraw as Counsel for Registrant.

5. On or about December 3, 2013 the Board entered an Order granting the Counsel for Registrants' request and allowing Registrant until January 2, 2014 to appoint new counsel, or to file a paper stating that Registrant chooses to represent itself. The Board's Order also stated that if Registrant files no response prior to the deadline, the Board may issue an Order to show cause why default judgment should not be entered against Registrant based on Registrant's apparent loss of interest in the case.

6. On or about January 28, 2014 the Board entered a Default Judgment against Registrant granting the Petitioner's Petition to Cancel and cancelling Registrant's Federal Trademark Registration No. 4,284,010.

7. On or about January 31, 2014 Registrant filed a Motion to Set Aside Default Judgment requesting that the Board reinstate the case.

8. Registrant failed to serve its Motion to Set Aside Default Judgment to Counsel for Petitioner.

9. On or about March 11, 2014 the Board entered an Order stating that in order to expedite this matter it had forwarded a copy of Registrant's Motion to Set Aside Default Judgment and Reinstate the Cancellation Proceeding to Counsel for Petitioner as Registrant failed to indicate proof of service of the same.

ARGUMENT

As basis for the instant Motion to Set Aside the Default Judgment and Reinstate the Cancellation Proceeding, Registrant alleges that it had difficulty finding new counsel to represent them in this matter and during that time the cancellation occurred and that it now wishes to represent itself. Although it is not specifically cited in the Registrants' Motion, it is assumed that Registrant is seeking relief pursuant to Fed.R.Civ.P. 60(b).

In considering a Motion filed pursuant to Fed.R.Civ.P. 60(b), the Board has relied upon the factors of excusable neglect established by the Supreme Court in the Pioneer Investment Services Co., 507 U.S. 308, 395 (1993) case, namely:

“At the bottom and equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include... [1] the danger of prejudice to the [non-moving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.”

A. Petitioner Faces Prejudice if Registrant is Allowed to Resume this Cancellation Proceeding and the Proceedings Will Have Been Unduly Delayed and Prolonged.

Petitioner will be prejudiced if the Board sets aside its Default Judgment in this proceeding because the continued registration of Registrant’s mark confers upon Registrant rights to which it is not entitled and is inconsistent with the prior established rights of Petitioner in its mark LIQUID RELAX. Moreover, in the wake of the Board’s earlier decision, Petitioner has moved forward with plans to advance its business interests under the brand. Should the Board rule in the Registrant’s favor the Petitioner would be further prejudiced by incurring the costs associated with said investment only to see the same placed once again back in limbo as a result of the Registrant’s dilatory efforts in this matter.

Further, Petitioner ability to prosecute this matter has been prejudiced by Registrant's failure to adhere to the Board’s Deadlines, Registrant’s delay of two (2) months in filing this motion and Registrant’s failure to properly serve its Motion to Set Aside Default Judgment and Reinstate the Cancellation Proceeding to Counsel for Petitioner. Petitioner has diligently litigated this matter since the instituting this proceeding and has extended substantial effort and financial resources in pursuit of this matter. Accordingly, setting aside the Default Judgment in this matter will cause uncertainty to Petitioner’s business.

As such, it is submitted should the Board rule in Registrant’s favor the Petitioner will be prejudiced by the same.

B. The Delay in filing a Response to the Board's Order mailed on December 2, 2013 was within Registrant's Control.

In the instant Motion, Registrant concedes it was aware that its counsel filed a motion to withdraw. However, Registrant fails to make any representation to the Board as to what efforts it took to assume the defense of its case in a reasonable time from following the discharge of its counsel. Registrant also concedes that it did receive the Board's January 28, 2014 Order concluding this matter again without any explanation as to how mail sent to the same address did not reach the Registrant in December 2013 but did in January of 2014. Again, the Registrant offers no explanation as to why itself, after having assumed representation of this matter, failed to take any interest in the case from early December 2012 until into 2014.

Under the facts in this case, Registrant's neglect is not excusable and was within control of Registrant. The Board has held that failure to adhere by court deadlines is not excusable neglect. See *Syosset Labs.*, 216 U.S.P.Q. at 332 (receipt of a trial order should indicate time periods are running and that an inquiry to the Board would be appropriate). Deliberate or willful conduct is never excusable neglect. See U.S., 938 F.2d at 1421 (no response filed in opposition to summary judgment motion, no motion for extension of time to respond, and no reason given).

Based upon these facts it cannot be said that the Registrant has satisfied the requisite standard to set aside the Board's Order for Default Judgment in this matter as the Registrant has, in reality, offered no basis upon which the Board could or should grant the requested relief.

In short, perhaps the Registrant now has a renewed interest in defending this matter. However, this renewed interest does not excuse his past transgressions in failing to act as required by the rules.

CONCLUSION

In conclusion, the Federal Rules of Civil Procedure do not support Registrant's Motion to Set Aside the Board's Default Judgment and to Reinstate the Cancellation Proceeding. The neglect and delay attributed Registrant is not excusable. Petitioner would be prejudiced if this proceeding were revived

because Petitioner expected the matter to be terminated and has relied on that expectation. Petitioner respectfully requests the Board deny Registrant's Motion.

Respectfully submitted this 31st day of March, 2014.

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